THE

AMERICAN LAW REGISTER.

JANUARY, 1873.

HEARSAY EVIDENCE.

In the case of *Lutterell* v. *Reynell*, 1 Mod. 282–283, it is stated, that "several witnesses were received and allowed to prove, that William Maynard did, at several times, discourse and declare the same things, and to the like purpose, that he testified now. And my Lord Chief Baron said, "though a hearsay is not to be allowed as a direct evidence, yet it might be made use of, to this purpose, viz.: to prove that William Maynard was constant to himself, whereby his testimony was corroborated."

In Bac. Abr. tit. *Evidence* (K), the above case, and also Skin. 402, pl. 37, and 2 Hawk. P. C. 431, are quoted, and the doctrine is thus stated: "It seems agreed, that what another has been heard to say, is no evidence, because the party was not on oath; also, because the party who is affected thereby, had not an opportunity of cross-examining; but such speeches or discourses may be made use of, by way of inducement or illustration of what is properly evidence. Also, what a witness hath been heard to say at another time, may be given in evidence, in order either to invalidate or confirm the testimony he gives in court," &c.

The doctrine of the case in 1 Mod. is given in the text of Buller's N. P. 294 (ed. of 1791), but it is added: "But, clearly, it is not evidence in chief, and it seems doubtful, whether it is so, in reply or not"—and for this, the case of *Holliday* v.

Sweeting, Mich. Term 16 Geo. 3, is cited. See also Lofft's Gilb. 279. This rule of evidence was followed on the trials for high treason in Ireland in the years 1795 to 1798: 1 MacNally Ev. (ed. of 1804), pp. 378, et seq.

In the case of *Rex* v. *Parker*, decided at Trinity Term 23 Geo. 3, in the year 1783, 3 Doug. 242 (26 E. C. L. R. 95 top), but not published in America until the year 1831, BULLER, Justice, said, in the face of the above and other authorities, that "it was now settled, that what a witness said, not upon oath, would not be admitted to *confirm* what he said upon oath; and that the case of *Lutterell* v. *Reynell*, and the passage cited from Hawkins, was not now law." This decision settled the law in England, and so it remains, to this time.

In 1 Phillips on Ev. 307, it is said: "It may be observed, on this kind of evidence in general, that *a representation without oath*, can scarcely be considered as *any confirmation of a statement upon oath. It is the oath that confirms; and the bare assertion that requires confirmation.* The probability is, that almost in every case, the witness who swears to certain facts, at the trial, has been heard to assert the same facts before the trial; and it is not so much in *support of his character*, that he has given the same account, as it would be to *his discredit*, that he should ever have made one different," &c. Mr. Phillips then goes on to say: "In one point of view, a former statement by the witness appears to be admissible, in confirmation of his evidence; and that is, where the counsel on the other side impute a design to misrepresent, from some motive of interest or relationship; there, indeed, in order to repel such an imputation, it might be proper to show, that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts." See also 2 Poth. Ob. 251–2, Evans's Ed. 1826.

Mr. Starkie, in his 1st vol. p. 148, says: "It seems to be the better opinion that a witness cannot be confirmed by proof that he has given the same account before, even although it has been proved that he has given a different account, in order to impeach his veracity; for his *mere declaration of the fact is not evidence.*" His having given a contrary account, although not upon oath, necessarily impeaches either his veracity or memory; *but his having asserted the same thing, does not in general, carry his*

credibility further than, nor so far, as his oath. He then proceeds to say: "But although such evidence be not generally admissible in confirmation of a witness, there may be many cases, where, under *special circumstances*, it possibly might be admissible; as for instance, in contradiction of evidence, tending to show, that the account was a *fabrication of late date*, and where consequently it becomes material to show that the same account had been given before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen."

Mr. Greenleaf, vol. 1, sec. 469, says: "But evidence, that he has, on other occasions, made statements similar to what he has testified in the cause, is not admissible; unless, where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause; in which case, it seems, it may be proper to show, that he made a similar statement, before that relation existed." See also 2 Russ. on Crimes 982, for exceptions to the general rule, that hearsay evidence is not admissible. Mr. Russell, however, does not notice the above as an exception. 2 Russ. on Crimes 682–690, ed. of 1836.

In the United States, there has been diversity of decision, arising from some of the courts having followed the decision in 1 Mod. Thus, *Commonwealth* v. *Bosworth*, 22 Pick. 397; *Henderson* v. *Jones*, 10 S. & R. 322; *Coffin* v. *Anderson*, 4 Blackf. 398. But, in *Robb and Others* v. *Hackley & Welton*, 23 Wend. 50, BRONSON, J., in a very able opinion, repudiates the doctrine of the earlier English cases, which, he declares, are no longer respected in Westminster Hall, and says: "I have failed to discover in them, anything calculated to shake my decided conviction, that this kind of confirmatory evidence is of *dangerous tendency*, and ought not to be received, except under such special circumstances as already have been noticed. We have not, in this state, departed from the ancient and safe landmark in the law of evidence, which requires a witness in all cases to speak under the solemn sanction of an oath, and I am unwilling to peril the lives, the fame, or the property of individuals, by adopting the contrary doctrine." To the same point, consult 24 Wend. 465; 17 Barb. 489; 1 Parker C. R. 147; 12 Vermt. 346; 13 Id. 208; 5 Rawle 91; 10 Peters 412; 11 How. 480.

The admissibility of such testimony (see Cowen & Hill's notes to Phillips on Evidence, vol. 3, top page 777, ed. of 1843) "is

well established in several courts, in all the plenitude of the *old authorities*," citing, amongst other decisions, that of *Cooke* v. *Curtis*, 6 Har. & J. 93, decided in June 1823. That case was followed by *Washington Fire Ins. Co.* v. *Davison & Symington*, 30 Md. 105, decided in January 1869, but no reason was assigned, except that the ruling of the court below was affirmed, as falling within the decision in *Cooke* v. *Curtis*. *McAleer* v. *Horsly*, 35 Md. 439, decided in March 1872, completes the series of decisions in Maryland based upon the case in 1 Modern. In this latter Maryland case, it appears that the very foundation of *Cooke* v. *Curtis* was attacked, and the authorities upon which it was decided shown to have been exploded long ago in England, and generally in the United States. Notwithstanding this, the court, at page 464, says: "No matter what may be the law decided by *courts of other states, or elsewhere, Cooke* v. *Curtis* is a binding authority on it," not because well founded on the general principles of evidence, but because "said case had remained unquestioned by the courts of this state (what courts had the right to question it?) for nearly fifty years, and whilst it would not be expedient or safe to extend or enlarge its application, yet it has been the uninterrupted practice of all courts, to receive their own decisions as of binding force," &c. "*Stat pro ratione, voluntas.*"

The court, in 35 Md., apparently not being satisfied with the reason it had given in the case of *Cooke* v. *Curtis* proceeds to say: "But an examination of the authorities will show that *Cooke* v. *Curtis* is not such a wide departure from principle or adjudged cases as has been asserted in argument, and that the admissibility of such evidence is cogently advocated in *Henderson* v. *Jones*, 10 S. & R. 332, and *Coffin* v. *Anderson*, 4 Blackf. 395," still referring to cases based upon the exploded doctrine announced in 1 Modern. In regard to these two cases, quoted in 35 Md. with some approval, the Supreme Court of the United States in *Conrad* v. *Griffey*, 11 How. 491, said: "While the rule was otherwise in England (viz. in conformity to the decision in 1 Modern), some of the state decisions, already cited, were expressly grounded on the rule (see *Henderson* v. *Jones*, 10 S. & R. 332), and others on cases adopting that rule, 4 Blackf. 398. But, since the rule became changed in England, or from being doubtful, became *well established against the introduction of such testimony*, the practice in some states, as in New York and Vermont,

has been settled so as to correspond; *and in this court also, it has taken the same direction.*" And the case of *Henderson* v. *Jones* has since been overruled by the Supreme Court of Pennsylvania, in *Craig* v. *Craig*, 5 Rawle 91.

In 10 Peters 412, STORY, J., delivering the opinion of the court, said: "It is true that in *Lutterell* v. *Reynell*, 1 Mod. Rep. 282, it was held, that though hearsay be not allowed, as direct evidence, yet, it may be admitted, in corroboration of a witness's testimony, to show that he affirmed the same things upon other occasions and that he is still constant to himself. Lord Chief Baron GILBERT has asserted the same opinion in his treatise on Evidence, p. 135. But Mr. Justice BULLER, in his Nisi Prius treatise, p. 294, says: "But clearly it is not evidence in chief; and it seems doubtful, whether it is so in reply or not." The same question came before the House of Lords in the *Berkeley Peerage Case*, 4 Camp. 401, and it was there said by Lord REDESDALE, that he had always understood, that, for the purpose of impugning the testimony of a witness, his declarations at another time might be inquired into; but not for the purpose of *confirming his evidence.* Lord ELDON expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause. Lord Chief Justice EYRE is also represented to have rejected such evidence, when offered on behalf of the defendant on a prosecution for forgery. We think, this is not only the better, but the *true opinion;* and *well founded on the general principles of evidence.*" In the opinion of the Supreme Court of the United States, as expressed in the two above cases, *Cooke* v. *Curtis* would be a "wide departure from principle and reported cases." In 35 Md., STEWART, J., dissented from the other four judges, upon the point of evidence, and in a brief opinion, clearly and cogently enforced what the Supreme Court of the United States declared to be the *true opinion.*

The doctrine thus announced in Maryland, being exceptional and sustained neither upon the general principles of evidence, nor by authority, we should have thought that the better conclusion would have been to overrule the previous decisions. The maxim *stare decisis*, though of the greatest weight when applied to rules of property, is not entitled to the same consideration in matters which relate merely to the remedy where a change will not disturb vested rights.